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No. 92-400

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

LINCOLN LOG HOMES, INC.,
Petitioner,

vs.

STANLEY ZONA and DEANNA ZONA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondents, Stanley and Deanna Zona, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Sixth Circuit's opinion in this case entered June 6, 1992, reversing the decision in the captioned matter by the United States District Court for the Northern District of Ohio.

The procedural facts are taken from the docket sheet of Case No. 88-0074 from the Clerk's Office of the United States District Court for the Northern District of Ohio.

On January 11, 1988, the Respondents filed a Complaint in the United States District Court for the Northern District of Ohio, Eastern Division—Case No. 88-0074 against the Petitioner. The suit alleged, *inter alia*, that the Petitioner breached its contract with the Respondent by providing negligently preassembled and inferior quality building materials for constructing a log home.

The parties received the trial court's standing order pre-trial rules on January 12, 1988.

The Petitioners filed their Answer on February 1, 1988. On February 8, 1988, the District Court set a pre-trial for February 25, 1988. On February 29, 1992, the District Court set a discovery cut-off date of April 29, 1988 with dispositive motions to be filed by May 13, 1988. Throughout the action, this deadline had been extended either through a motion by the Respondent, by joint motion, and *sua sponte*.

On April 14, 1988, the District Court ordered a discovery pre-trial for May 3, 1988.

On April 26, 1988, the parties jointly moved to continue the discovery cut-off date. The motion was granted on May 8, 1988. Another order journalized the same day continued the discovery cut-off date until June 10, 1988 and submission of attorney pre-trial statements for July 29, 1988.

On June 16, 1988, the Respondents gave notice to take a deposition of Nicholas Dieglio, an agent of the Petitioners.

On July 8, 1988, the parties again jointly moved for an extension to file attorney pre-trial statements. The joint motion was overruled on September 8, 1988.

On September 22, 1988, the Respondents moved to amend its Complaint. The District Court denied the motion on September 28, 1992.

On October 31, 1988, the Petitioners moved for summary judgment and for sanctions. The District Court ordered a hearing for January 4, 1989. The District Court further set a settlement hearing for January 25, 1989. The District Court overruled the Petitioners' motion for summary judgment and sanctions on January 28, 1989. The District Court ordered pre-trial statements due on February 28, 1989.

On March 20, 1989, the District Court dismissed the cause with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure for failure to timely file a pre-trial statement.[1] The dismissal was given without notice or without a cure period to purge itself of being in danger of dismissal with prejudice.

On April 17, 1989, the Respondents filed a motion to reinstate the action and supplemented it with another brief on May 5, 1989. The Petitioners filed a brief in opposition to the Respondents' motion on May 16, 1989. The District Court denied the motion on February 20, 1990.

On March 22, 1990, the Respondents filed a timely notice of appeal from the denial of the reinstatement, Case No. 90-3275. On January 8, 1991, the United States Court of Appeals for the Sixth Circuit remanded the case

[1] The documents requested are part of the pre-trial statement which is included in the Joint Appendix filed in the Court of Appeals. The Joint Appendix is 838 pages.

to the District Court for finding of facts to determine if the Respondents acted in bad faith or contumacious conduct and to determine if a lesser sanction than dismissal should ensue.

On February 7, 1991, the District Court held a hearing to determine if a lesser sanction should be imposed.

The District Court stated at Tr. 4:

> The Court must consider whether the Plaintiff has engaged in bad faith or contumacious conduct.
>
> At this point, I'd like to interject that I disagree strenuously with the Court of Appeals. All they have to do is look at the standard order where they have liberal extensions of time and people don't do what they are supposed to do, so the Court of Appeals doesn't know what they are talking about.

Furthermore, at Tr. 5 the Court stated:

> What they are really saying is even though I have in my standing order that if you don't do your thing, I'm going to dismiss you, and I say it eight or ten times, you can ignore everything I say and the Court of Appeals will send it back and give you a slap on the wrist. That's the way I read it. So it nullifies everything I do.

The Court then discussed with Petitioner's counsel the Petitioner's reasons for not reinstating the case at Tr. 8-9.

> Mr. Leithart. I believe, again what they are saying you to do is give them an opinion that's more than just 'The case is dismissed.'
>
> Your honor, I believe that's what they are asking for. I believe that's what they're indicating.
>
> The Court. These yo-yos don't read nothing.

Further, at Tr. 9, the Court stated:

> They don't like dismissal. They are saying, Trial Judge, you can make any threat you want, but unless it's a slap on the wrist you can't do it. Is that what you think they are telling me? I think that's what they are telling me they'd like the law to be.

At Tr. 11, the District Court stated:

> I can't say that you were in bad faith, but I can say you were in total, utter disregard for my standard order.

The Court did not find the Respondents in bad faith. Tr. 12, lines 17-18. The District Court journalized the dismissal order on February 18, 1991. On March 18, 1991, the Respondents filed a timely notice of appeal from the dismissal, Case No. 91-3275, United States Court of Appeals for the Sixth Circuit.

Upon the second appeal, the United States Court of Appeals for the Sixth Circuit on June 5, 1992 reversed and remanded the case to the Chief Judge of the Northern District of Ohio for reassignment to another judge.

The Petitioners filed their Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE DECISION OF THE COURT OF APPEALS GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

The Decision of the United States Court of Appeals for the Sixth Circuit located in the appendix of the Petition was decided on sound precedent not requiring a review by this Court.

This cause has been before the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) twice. Both times the Sixth Circuit reversed the District Court's decision in favor of the Respondents to allow the case to proceed on the merits. The precedent relied upon was mostly from Sixth Circuit precedent concerning civil procedure and courtroom management.

The dispute is mostly factual, not concerning a point of law outside of how a court administers its dockets.

Prior to this decision, the Sixth Circuit had held in *Vinci v. Consolidated Rail Corp.*, 927 F.2d 287, 287-88 (6th Cir. 1991); *Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988); and *Carter v. City of Memphis*, 636 F.2d 159, 162 (6th Cir. 1980) that a record of willfulness, bad faith, or contumacious conduct was required to warrant a dismissal of the case. The District Court had found that no bad faith occurred. Tr. 12, lines 17-18.

The Sixth Circuit held notice other than a standing order is an absolute precondition to dismissal with prejudice following the holding in *Tingler v. Marshall*, 716 F.2d 1109, 1111-12 (6th Cir. 1983).

Furthermore, the Sixth Circuit approved *Daniels v. Brennan*, 887 F.2d 783 (7th Cir. 1989) holding a cure period as a

> functional equivalent of issuing an order stating that a plaintiff's action will be dismissed on a certain, future date unless a certain action is taken. Accordingly, we have no quarrel with *Daniels*. The fact remains, however, that Judge Krenzler gave the Zonas neither notice nor a cure period. As expressed earlier, general, boilerplate notice is insufficient.
>
> At oral argument on remand, the district court expressed its concern that our decision renders the court unable to enforce its elaborate standing order. It can, but not at the expense of a party's rights.

Brief of Petitioner, A4-5; *Zona v. Lincoln Log*, No. 91-3275 (6th Cir. June 5, 1992) 3-4.

The Petitioners base most of their argument upon *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). The argument is factually misplaced.

Link is distinguished from the instant case. In *Link*, the cause had been on the District Court's docket for six years. The instant case had only been on the District Court's docket for thirteen months. *Link* had been set for trial twice and was continued. The instant case had not been set for trial. A show cause order for dismissal had been set in *Link*. No show cause order for failing to timely file a pre-trial statement had been entered here.

In *Link*, Justice Harlan held at 633: "Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion."

The Sixth Circuit found that the District Court had acted outside its discretion. Because of the District Court's action, the Sixth Circuit remanded the cause to the Chief Judge of the Northern District of Ohio for reassignment to another District Court Judge.

The Petitioners fail to demonstrate a need for this Court to exercise jurisdiction and grant certiorari. There is no allegation of a conflict between the Courts of Appeals. This Court has denied certiorari where the review is sought which turns upon an analysis of particular facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984).

> [A] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

This Court has held it will not grant certiorari simply because the Court of Appeals committed an error below. In *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), then Justice Rehnquist wrote "this Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

"[T]he Court seldom takes a case merely to reaffirm settled law." *Estelle v. Gamble*, 429 U.S. 97, 115 (1978) (dissent).

CONCLUSION

For all the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Case No. C88-0074

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STANLEY ZONA and DEANNA ZONA,
Plaintiffs,
vs.
LINCOLN LOG HOMES, INC.,
Defendant.

Before: HON. ALVIN KRENZLER, *District Judge*

Cleveland, Ohio
February 7, 1991—1:50 p.m.

APPEARANCES:

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[2] PROCEEDINGS

THE COURT: The thing we have this afternoon is a civil case, 88-0074, Zona against Lincoln Log Homes. And some time ago I dismissed this case. An appeal was taken to the Sixth Circuit, and to summarize what they said, on January 28, '88 the Zonas filed a complaint alleging a breach of contract against the defendant Lincoln Log Homes. And it goes through the fact that we had the initial pretrial, discovery cutoff date, another post-discovery pretrial date, and so forth.

And then I put an order on for the pretrial statement, and they were supposed to be submitted on or before July 29, '88. On July 29, '88, the parties sought an extension of time to file the pretrial statement based on the extensive discovery process that is ongoing and will not be finished for another 45 to 60 days, so forth and so on.

Then, on September 22nd, the plaintiffs made a motion to amend the complaint, which was denied. On January 26, '89, I instructed the plaintiffs to submit the pretrial statement that was due on [3] July 29, '88, which was some six months earlier, and then the statement wasn't filed, so on March 30, '89, I dismissed the case with prejudice.

And then on April 17th, the plaintiffs made a motion to reinstate the complaint, and the plaintiffs said that the pretrial statement was not filed because of an ensuing possibility of settlement at the time that they were going to be filed. I denied the motion and the plaintiffs then appealed. And the appeal was on the basis that the plaintiffs' supplemental motion to reinstate the complaint with motion to file the pretrial statement was instanter. And then ten days after the case was dismissed, the plaintiff filed a pretrial statement.

And then the Court of Appeal goes on to discuss the authority and the power of the courts in appeals and so forth and so on. And they cite a case that agonized over what do you do when lawyers don't do what they're supposed to do, especially since they are forewarned in a standard order.

They talk about the case of Harris against Callwood wherein in the absence of notice, the District Court should not dismiss the case unless [4] the parties are engaged in bad faith or contumacious conduct. Nowhere in the record does it clearly show that the plaintiffs were put on notice that the District Court was contemplating dismissal for their persistent failures. The Court must consider whether the plaintiff has engaged in bad faith and contumacious conduct.

At this point, I'd like to interject that I disagree strenuously with the Court of Appeals. All they have to do is look at the standard order where they have liberal extensions of time and people don't do what they are supposed to do, so the Court of Appeals doesn't know what they are talking about.

Then, it says that the plaintiffs were not only late in filing the pretrial statement, but tendered the document only after dismissal. We're not satisfied, however, that this conduct in question was equivalent to bad faith or contumacious conduct. Therefore, we remand for further consideration by the District Court in light of the authorities cited and discussed whether a penalty or sanctions should be mandated rather than the case dismissed with prejudice.

[5] What they are really saying is even though I have in my standing order that if you don't do your thing, I'm going to dismiss you, and I say it eight or ten times, you can ignore everything I say and the Court of Appeals will send it back and give you a slap on the wrist. That's the way I read it. So it nullifies everything I do.

But I now have the motion, I've got the remand, so I don't have yet the demand that came back, but we can go ahead with the hearing. The file hasn't come back from the Sixth Circuit. We all know what it's about.

So obviously, the plaintiff wants me to reinstate the appeal and give him the sanctions, maybe a $10 fine or something like that, or give them a warning.

And the defendant? Do you go along with that? Do you want me to just reinstate the case and we'll try it? Is that what you want me to do?

MR. LEITHART: No, sir.

THE COURT: Well, stand up and tell me what you want me to do.

MR. LEITHART: Thank you. First, I'd like to point out that the way I read the decision [6] by the Court of Appeals was not to the effect that despite the fact that you set forth in your standing order that sanctions, including dismissal, may apply if the order is violated, that desite that, your dismissal was unwarranted; I read it to say that they want you to make some further findings concerning issues such as whether there was notice to the plaintiffs of this possibility. And it seemed to me from reading the decision what they were looking for is a finding to the effect that in your standing order there is sufficient notice from the very outset of the case, the very time you file a complaint here, that the failure to follow your rules may result in dismissal. I believe if you are to make—

THE COURT: Wasn't that called to the attention of the Court of Appeals?

MR. LEITHART: It was called to their attention, but my perception from the questions they are asking from the bench was their perception was that there was not sufficient detail in your order of dismissal for them

to rely on. So they are remanding it back to you to further consider all possible sanctions including the possibility of [7] dismissal. But if you decide dismissal is warranted, indicate to them where notice was given to the plaintiffs justifying dismissal.

Going back a step, I also believe there are some timing problems that the plaintiffs had. If you look on the third page of the decision, the Court of Appeals talks about Federal Rules 59 and 60 and whether the motion the plaintiffs filed was within the time frame set forth under those rules because there is no such thing as a motion to reinstate complaint.

THE COURT: You're talking about a motion from relief of judgment type of thing?

MR. LEITHART: Well, the way the case is construed is either such a motion is a Rule 59 motion or a Rule 60 motion.

THE COURT: But you have timing problems on both?

MR. LEITHART: You've got timing problems on both, your Honor. If it's a Rule 59 motion, you have ten days to file. They filed in 17 days, so they are out under that. If it's a Rule 60 motion, you can't substitute an appeal because—or Rule 60 motion can't operate as a [8] substitute for an appeal. They waited from your date of order.

THE COURT: You're saying even if I want to dismiss it, I can; and if I want to reinstate it, I can?

MR. LEITHART: That's right. They waited 12 months after your order of dismissal to file an appeal.

THE COURT: Are you saying then, assuming they filed timely to reinstate it, I was wrong in dismissing because they didn't follow the standard order and therefore you want me to reinstate it?

MR. LEITHART: No, I haven't gone that far yet. All I'm addressing is the timing problem. A motion to reinstate complaint, whatever that is, it's irrelevant.

THE COURT: How come the Sixth District misses that?

MR. LEITHART: I believe, again, what they are asking you to do is give them an opinion that's more than just "The case is dismissed."

Your Honor, I believe that's what they are asking for. I believe that's what they're [9] indicating.

THE COURT: These yo-yos don't read nothing.

MR. LEITHART: And I believe if you set out the timing problems under Rule 59 and 60, and set out in a specific finding that they had notice under the standing order, that when it gets back to the Sixth Circuit, they will uphold a dismissal.

THE COURT: Thank you.

Chris, I take it you agree with everything he said?

MR. FORTUNATO: No, I do not, your Honor. What the Court of Appeals on its remand has stated, your Honor, is to make further findings, consideration of whether a penalty or sanctions should be mandated, whether or not a case should be dismissed in light of the situation that we're—

THE COURT: They don't like dismissal. They are saying, "Trial Judge, you can make any threat you want, but unless it's a slap on the wrist, you can't do it." Is that what you think they are telling me? I think that's what they are telling me they'd like the law to be.

[10] MR. FORTUNATO: I don't think so. I think what they are looking at, if you look at these cases, that all of these cases have cited that dismissal is, in most cases—except with the exception of a case like Coston against Detroit Edison where the facts are not similar, or Link against Wabash—that dismissal is too severe a

remedy except in cases where the behavior of the parties as well as their counsel, not counsel alone, is so contumacious that they have thumbed their nose at the court.

THE COURT: Well, my view is when I have in my standing order so many of those warnings, and if they then don't do what I say, I view that as whatever those fancy words they quoted, contumacious or whatever—

MR. FORTUNATO: Well, your Honor, first, I thought I was going to be opening as well, and I felt that we do not come here as representatives for Stan Zona, and Stan Zona himself does not come here stating that we have been good guys and we have been maligned totally because we admit that we have made some mistakes here. We admit that we do not present ourselves in [11] the best possible light because of a statement not being timely filed.

However, I hope, given the fact that I brought the pretrial statement here, that I've complied, that we have placed ourselves in a sufficient locus poenitentiae to be hopefully reinstated.

I don't look for, as you've mentioned, a slap on the wrist. We deserve a punch on the arm or maybe in the jaw. We just feel that if we were dismissed out though, your Honor, that penalty would be too severe. We understand that a sanction will have to be imposed here.

THE COURT: What does "contumacious" mean?

MR. FORTUNATO: Contemptuous.

THE COURT: I can't say you were in bad faith, but I can say you were in total, utter disregard for my standard order. Is that not enough to dismiss? But we're going to have to do it again. I just don't—you see, I have great sympathy for you, Chris. I love and admire you. I feel sorry for your clients, but once I do what I do, I have to stand there and I've got to put on [12] the record why.

They may not like my reason and they may say you can always sanction, but you can't dismiss unless it's really, really bad, and then they'll tell us that when it comes back again. But I find that the plaintiffs' counsel was in total contempt of my standing order and they had enough warnings repeated.

I gave extensions of time, so forth, and it's dragged on and on, so I dismissed it with prejudice. I'm going to let that stand and I'm urging you to take it back up. And the issue then will be that your conduct cannot warrant a dismissal but warrants something less.

And what I'm asking the defendants' counsel, since you're going to defend it, I'm finding that, first of all, they were not in bad faith, that they were gross and totally and utterly in disregard of my standing order and were contemptuous of it.

So on that basis, I'm leaving the motion to dismiss stand. I think you're right on all of those time jurisdictional problems with the motion to reinstate and the motion for relief and so [13] forth. So you prepare an order for me based on what I just said and I'll sign it, and just to be accurate and fair, you're going to have to defend it on appeal.

MR. LEITHART: One question, your Honor. Should that order include a finding that there was advance notice of the possibility of dismissal? Because that is specifically set out in the standing order?

THE COURT: What you would do—

MR. FORTUNATO: I object to that.

THE COURT: What you do now is—you know, I'm jumping from the beginning, but I'm going to go through my standing order and find out how many places I say it.

MR. FORTUNATO: Would the Court also include in its findings that at the time settlement negotiations were being made and that in looking at this pretrial statement, that it was an extremely voluminous thing that was difficult, a couple hundred exhibits?

THE COURT: You submit what you're going to give to me to him, and then he can submit any supplementals and I'll take a look at it and [14] make my own. All right?

MR. FORTUNATO: All right.

THE COURT: I have in front of me—I'm assuming the mandate will be the same. They want me to decide whether a mandate other than dismissal should be done, and I'm saying no, based on the record in this case, which comes out of my standing order with all of the warnings and then the proceedings in the case. And if that's not enough to dismiss it, then I'll amend my standing order, and I'll let anybody do anything they want to do. You submit what you want. I'll take a look at it.

There is no question you filed it and you filed it late.

MR. LEITHART: Your Honor, I don't believe it's been filed.

THE COURT: It hasn't?

MR. LEITHART: I believe the—

THE COURT: I haven't looked at the docket sheet.

MR. LEITHART: I don't believe they ever filed one.

THE COURT: It says so in the Sixth [15] Circuit Court's opinion.

MR. LEITHART: I think the ten days refers to the motion, not to—does not refer—

THE COURT: You both submit what you want, then I'll make a note. I thought they said here they filed late.

MR. LEITHART: No, you can answer, Chris, but I don't think they ever filed a pretrial statement in this case at any time.

THE COURT: Oh, the motion was filed ten days after the order.

MR. LEITHART: Which is inaccurate, it was not filed within ten days.

THE COURT: The motion wasn't either?

MR. LEITHART: No, it was filed 17 days afterwards, 18 days, I believe.

THE COURT: You go through the docket sheet and give me the chronology of events, but remember you have people that are only going to read what I say; they are not going to look at the file. I don't know why we send them the file. They are not going to read it.

Thank you, Chris.

[16] MR. FORTUNATO: Thank you, your Honor.

MR. LEITHART: Thank you, your Honor.

THE COURT: Incidentally, this is the third one of these I've had. You know, they've mandated them back on dismissal and I've done the same thing again. I've just said different words, but I haven't changed my mind on any of them. So don't think I'm picking on you, because I have to stand on my standing order or else it doesn't mean anything.

(Hearing completed at 2:10 p.m.)